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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

No. 650.

L. W. BALDWIN and GUY A. THOMPSON, as Trustees of MISSOURI PACIFIC RAILROAD COMPANY, a Corporation;

Petitioners,

v.

SCOTT COUNTY MILLING COMPANY, a Corporation.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

PETITIONERS' SUPPLEMENTAL BRIEF.

H. H. LARIMORE,
Counsel for Petitioners.

Of Counsel:
RUSSELL L. DEARMONT,
THOS. J. COLE.

Petition for certiorari filed February 6, 1939. Certiorari granted March 13, 1939.

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JURISDICTION.

At pages 8 and 9 of brief of petitioners in support of application for writ of certiorari there was discussed the question of jurisdiction.

At page 6 in its brief in opposition to petition for writ of certiorari respondent makes the point that what constitutes a voluntary payment is a matter of general law and does not necessarily depend upon the construction of Section 16 of the Interstate Commerce Act (United States Code, Title 49, Section 16).

This contention is followed by the argument that this Court is without jurisdiction because of a finding by the Supreme Court of Missouri that petitioners were estopped by payment of the award of damages.

A somewhat similar contention was made in the case of **Union Pacific Railroad Company v. Public Service Commission of Missouri**, 248 U. S. 67.

That case involved the validity of a charge made by the Public Service Commission of Missouri for a certificate authorizing the issue of bonds secured by a mortgage on the whole line of the Union Pacific Railroad. The Missouri Commission had granted the authority and charged a fee therefor. The Railroad Company accepted the grant as required by its terms, but protested against the charge as an unconstitutional interference with interstate commerce. On appeal to the Supreme Court of Missouri, that Court, while holding that the charge was unreasonable, held the railroad estopped by its application to the Missouri Commission. When the case came to this Court it was held that the charge as made was an unlawful interference with commerce among the states, and touching the opinion of the Supreme Court of Missouri this Court said:

> "The Supreme Court of the State avoided this question by holding that the application to the Commission was voluntary and hence that the Railroad Company was estopped to decline to pay the statutory compensation. It is argued that a decision on this ground excludes the jurisdiction of this Court. But the later decisions show that such is not the law, and that on the contrary it is the duty of this Court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the federal right has been waived. **Creswill v. Knights of Pythias**, 225 U.

S. 246. Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary, as was attempted in **Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor**, 223 U. S. 280."

If the law were otherwise than as declared in the foregoing excerpt, the right of a citizen under a federal statute could, in the case of payments of money, be entirely defeated by a holding on the part of a state court that such payments were voluntary or made under circumstances as to render applicable the law of estoppel.

Attention is also called to the decision by this Court in the case of **Adam v. Saenger**, 303 U. S. 159, in which this Court, in discussing the existence of a claimed federal right turning on the meaning and effect of a California statute as construed by a Texas court, said:

"While this Court re-examines such an issue with deference after its determination by a state court, it cannot, if the laws and Constitution of the United States are to be observed, accept as final the decision of the state tribunal as to matters alleged to give rise to the asserted federal right. This is especially the case where the decision is rested, not on local law or matters of fact of the usual type, which are peculiarly within the cognizance of the local courts, but upon the law of another state, as readily determined here as in a state court."

PAYMENT OF THE AMOUNT SUED FOR WAS NOT VOLUNTARY.

Under point I and at page 10 of brief of petitioners in support of petition for writ of certiorari, there is discussed the question of whether payments of the amount sued for were voluntary.

It is the view of petitioners that the question of whether such payments were voluntary or involuntary is outside of the issues, but since respondent asserts as a defense that such payments were voluntary, we again refer to the case of **Union Pacific R. R. Co. v. Public Service Commission of Missouri**, supra, and to that part of the Court's opinion which is as follows:

> "On the facts we can have no doubt that the application for a certificate and the acceptance of it were made under duress. The certificate was a commercial necessity for the issue of the bonds. The statutes, if applicable, purported to invalidate the bonds and threatened grave penalties if the certificate was not obtained. The Railroad Company and its officials were not bound to take the risk of these threats being verified. Of course, it was for the interest of the Company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called. **The Eliza Lines**, 199 U. S. 119, 130, 131. If, as may be, the Supreme Court of the State regards or will regard this statute as inapplicable, **Public Service Commission v. Union Pacific R. R. Co.**, 271 Missouri 258, probably the State would not wish to retain the charge, but we repeat, the Railroad Company was not bound to take the risk of the decision, and no proceeding has been pointed out to us by which it adequately could have avoided evils that made it practically impossible not to comply with the terms of the law, **Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor**, 223 U. S. 280, 286."

Also, in discussing further the question of whether the payments involved were voluntary it should be stated that the supplemental order of the Commission awarding reparation was dated March 11, 1929 (R. 25); that payment of

the award was made on the demand of respondent, at various dates between April 4 and April 19, 1929; that under the rules of the Commission a petition for rehearing that part of any case relating to reparation must be filed within sixty days after service of report therein (R. 29); and that on the 25th day of April, 1929, within said sixty days, a petition for rehearing was filed (R. 26).

It thus appears that respondent elected to demand and receive payment before the expiration of the said sixty days with no assurance, express or implied, from petitioners that petition for rehearing would not be filed with the Commission.

RECOVERY BY PETITIONERS WOULD BE IN ACCORD WITH THE PURPOSES OF THE INTERSTATE COMMERCE ACT.

Under heading numbered IV., and at page 19 of petitioners' brief in support of petition for writ of certiorari, the point is made that a holding that petitioners are entitled to recover the money sued for would be in accord with the purposes of the Interstate Commerce Act.

In support of that position petitioners cited the case of **Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297,** in which this Court held that the purpose of Congress in passing the Interstate Commerce Act was to cut up by the roots every form of discrimination, favoritism and inequality.

In further support of the point that a recovery of the money sued for would be in accord with the purposes of the Interstate Commerce Act, we cite the case of **A. J. Phillips Company v. Grand Trunk Western Railway Company, 236 U. S. 662.**

In the case cited there was an attempt to recover damages by way of reparation through a suit brought four years after the plaintiff's cause of action arose and after the federal Statute of Limitations had run against the claim.

It was argued in the case cited that, since there was interposed a general demurrer to the declaration, the Michigan practice should apply, but this Court said:

> "But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years **and not after.** Under such a statute the lapse of time not only bars the remedy but destroys the liability. (Finn v. United States, 123 U. S. 227, 232) whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. This will more distinctly appear by considering the requirements of uniformity which, in this as in so many other instances, must be borne in mind in construing the Commerce Act. This obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law and to treat all shippers alike would have made it illegal for the carriers, either by silence or by express waiver to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different States, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act, which forbids all devices by which such results may be accomplished. The prohibitions of the

statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier. The Railroad Company therefore was bound to claim the benefit of the statute here and could do so here by general demurrer. For when it appears that the complaint had not been filed within the time required by the statute it was evident, as a matter of law, that the plaintiff had no cause of action. The carrier not being liable to the plaintiff for overcharges collected more than four years prior to the bringing of this suit, it was proper to dismiss the action."

The reasoning of the **Phillips case**, supra, is particularly applicable to the facts of the instant case. Conceivably, several shippers might join in a complaint before the Interstate Commerce Commission seeking awards of damages and the Commission might award damages in favor of each of such complainants against the carrier. The latter, desiring to prefer one shipper over another, might pay to the favored shipper the award of the Commission and decline to pay the others. After such payment the carrier might secure, at the hands of the Commission, a reversal of its previous findings, in which case the shipper receiving payment would unquestionably enjoy a preference over those not paid if the opinion of the Supreme Court of Missouri that such payment could not be recovered back is correct.

To permit the shipper paid by the carrier to retain the payment, notwithstanding the award entered by the Commission had been set aside, in face of the fact that the carrier would not be required to pay other shippers similarly situated because such award had been vacated, would open the door to discrimination and preference

which the Interstate Commerce Act is particularly designed to prevent.

Respectfully submitted,

H. H. LARIMORE,
Counsel for Petitioners.

Of Counsel:

RUSSELL L. DEARMONT,
THOS. J. COLE.